# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1345

NOLL MOTORS, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

**MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION**

1. The Board found that the Company violated Section 8(a)(1) of the National Labor Relations Act by engaging in the following activities: During an election campaign by the Union (International Association of Machinists, AFL–CIO), the Company's president called a meeting of the employees at which he questioned them individually about their reasons for wanting a union, and stated that, if the Union got in, the Company would have to operate under more stringent work standards that all the employees could not meet. The president also prepared a speech, which a foreman delivered at a second employee meet-



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ing. He warned that unions cause trouble and strikes, that the Union would call a strike whether or not the employees could meet their living expenses or financial obligations, and that a plant where the union had won an election had closed.[1] In addition, the Company's garage manager promised two employees benefits if the Union were defeated in the forthcoming election (Pet. App. 47–48, 60–62). The Board further found that the Company violated Section 8(a)(5) of the Act by refusing the Union's request to bargain at a time when the Union possessed valid authorization cards from a majority of the employees, and that the Company's subsequent 8(a)(1) violations tended to undermine the Union's majority status and render a fair election unlikely (Pet. App. 48, 64–68). Accordingly the Board ordered the Company, *inter alia*, to bargain with the Union upon request (Pet. App. 48–49, 71–73).

The court of appeals, applying the principles enunciated in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, sustained the Board's unfair labor practice findings and enforced its order (Pet. App. 40–45).

2. Petitioner's basic contention is that the Board and the court below misapplied *Gissel* because the

[1] The relevant portions of this speech (Pet. App. 58–59, 77–81) are similar to the statements that this Court, in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 616–620 (the *Sinclair* case), found amounted to threats of plant closure. The foreman stated that he was reading the speech for the president in his absence (R. 49). ("R" refers to the printed record in the court below.)

Company's violations of Section 8(a)(1) were not serious enough to support a bargaining order (Pet. 8–19.[2] This issue involves only an evaluation of the facts of this particular case and hence does not warrant review by this Court. Moreover, a comparison of the employer statements here with those in *Sinclair,* one of the companion cases to *Gissel,* reveals that they are essentially similar (see n. 1, *supra*). The Court in *Sinclair* sustained the Board's finding that such statements constituted "threats of reprisal [which] were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats." 395 U.S. at 615, 620.[3]

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[2] In *Gissel*, this Court recognized that a bargaining order was appropriate in both "'exceptional' cases marked by 'outrageous' or 'pervasive' unfair labor practices," and "cases marked by less pervasive practices which nonetheless still have a tendency to undermine majority strength and impede the election processes." It noted, however, that "there is still a third category of minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargain order." 395 U.S. at 613–615.

[3] Petitioner's contention (Pet. 10–17) that the unfair labor practices here were less serious than those in other post-*Gissel* cases where the Board did not issue bargaining orders does not withstand analysis. In none of the cases cited by petitioner did the company president disseminate statements to all the employees which were found to contain threats of reprisal. Those cases merely involved isolated incidents of interrogation and threats directed to individual employees by lesser company representatives. *Olney Motels, Inc.*, 176 NLRB No. 111, 71 LRRM 1516, is inapposite, since there the union did not possess a card majority. *National Labor Relations Board* v. *General Stencils*, 76 LRRM 2288 (C.A. 2), January 19, 1971, is similarly distinguishable. As Judge Friendly there stated, in remanding the

3. Petitioner's contention that the passage of time since the signing of the authorization cards and the commission of the unfair labor practices (Pet. 28–30) nullifies the propriety of a bargaining order likewise does not warrant further review. In *Gissel*, the Court indicated that this consideration is ordinarily irrelevant in determining the propriety of a bargaining order. 395 U.S. at 610–612. *Clark's Gamble Corp.* v. *National Labor Relations Board,* 422 F. 2d 845 (C.A. 6), certiorari denied, October 19, 1970, No. 265, 1970 Term, and *National Labor Relations Board* v. *American Cable Systems, Inc.,* 427 F. 2d 446 (C.A. 5), certiorari denied, December 14, 1970, No. 737, 1970 Term, are distinguishable. Those cases dealt with the effect of employee turnover, not the passage of time as such. See also *National Labor Relations Board* v. *American Art Industries, Inc.,* 75 LRRM 2352 (C.A. 5), September 9, 1970, certiorari denied, February 22, 1971, No. 995, 1970 Term.[4]

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case to the Board to reconsider the propriety of a bargaining order after the court had set aside some of the Board's unfair labor practice findings: "On the other hand, if there had been evidence of *widespread dissemination* of the threat of plant closure (such as the speech, the letters and the pamphlet sent to all employees in the *Sinclair* case) this would * * * clearly support a bargaining order * * *" (emphasis added). 76 LRRM at 2294.

[4] Petitioner's contention (Pet. 25–28) that the authorization cards were tainted because they were secured by misrepresentations is not properly presented here. The Trial Examiner found that all 15 of the cards submitted by the Union were free of misrepresentations and had been validly signed by the employees involved. The Company did not file exceptions with the Board with respect to these findings. Having failed to except to the Trial Examiner's findings, the Company is precluded by

Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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Section 10(e) of the Act, 29 U.S.C. 160(e), from challenging them in court. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 256; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388–389.

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